IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. NO. 15-CR-4268 JB

ANGEL DELEON, et al.,

Defendants.

REPLY TO UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR DESIGNATION OF EVIDENCE BY THE GOVERNMENT PURSUANT TO RULE 12(b)(4)(B) (DOC. 1281)

COMES NOW Christopher Garcia, by and through counsel, Amy Sirignano of the Law Office of Amy Sirignano, PC and Christopher W. Adams of the Law Office of Christopher W. Adams, and all joined defendants to the initial brief, including Edward Troup, through co-counsel Cori Harbor-Valdez, and Patrick Burke, and Arturo Arnulfo Garcia, through co-counsel Bill Blackburn, and Scott Davidson, and Carlos Herrera, through co-counsel Michael Davis, and Carey Bahalla, and Daniel Sanchez, through co-counsel Amy Jacks, and Richard Jewkes, and Christopher Chavez, through co-counsel John Granberg, and Orlando Mondragon, and Rudy Perez, through co-counsel Ryan Villa, and Justine Fox-Young, and Billy Garcia, through co-counsel James Castle, and Robert Cooper, and Joe Gallegos, and through co-counsel Brock Benjamin and Rick Sindel, and in reply to the government's response (Doc. 1334), states the following:

On October 2, 2017, Mr. Garcia, with joined defendants filed Opposed Motion for Designation of Evidence By The Government Pursuant To Rule 12(b)(4)(B) (Doc. 1281). This Motion asked the Court to order the government to designate any and all evidence that the government intends to use in the prosecution of Mr. C. Garcia, Mr. Troup, Mr. A. Garcia, Mr. Herrera, Mr. Sanchez, Mr. Chavez, Mr. Perez, Mr. B. Garcia, Mr. Gallegos, Mr. Rodriguez, and Mr. Varela. Doc. 1281.

On October 16, 2017, the government filed the United States' Response in Opposition To Defendant's Motion For Designation Of Evidence By The Government Pursuant To Rule 12(b)(4)(B) (Doc. 1281). Doc. 1134.

The government chose to focus its response to the defendants' request for the Court to consider ordering the government to designate evidence it reasonably plans to offer in its *rebuttal*. *See* Docs. 1281, 1334. Ordering the government to designate such evidence is within the Court's inherent authority as well has been suggested by cases a reasonable consideration under Rule 12. *See United States v. Anderson*, 416 F. Supp. 2d 110, 110 (D.D.C. 2006) (noting, as long as rebuttal evidence was not planned in advance of trial, the court would not prevent the government from using evidence it had not noticed under Rule 12 for purposes of rebuttal); *see also United States v. Lujan*, 530 F. Supp. 2d 1224, 1247 (D.N.M. 2008).

While Mr. Garcia and joining defendants asked the Court to consider ordering the government to also designate planned rebuttal evidence, the defendants'

substantive request asked the Court to order the government to designate evidence it intends to use and disclosed under Rule 16, following Rule 12(b)(4)(B). Fed. R. Crim. P. 12(b)(4)(B). Reasonably, Mr. C. Garcia, Mr. Troup, Mr. A. Garcia, Mr. Herrera, Mr. Sanchez, Mr. Chavez, Mr. Perez, Mr. B. Garcia, Mr. Gallegos, and Mr. Rodriguez asked the Court to order the government to designate the evidence with enough specificity that the defendants may easily identify the materials. *See* Doc. 1281; *United States v. Yonis Muhudin Ishak*, 277 F.R.D. 156, 159-60 (E.D. Va. 2011). This request was made with the acknowledgment that it was not intended to reveal the government's trial strategy "but merely to provide the defendant with sufficient information to file the necessary suppression motions." *See Lujan*, 530 F. Supp. 2d at 1246 (citing *United States. v. de la Cruz-Paulino*, 61 F.3d 986, 994 (1st Cir. 1995)) (citing also Fed. R. Crim. P. 12, advisory committee notes, 1974 amendment)); *see also Yonis Muhudin Ishak*, 277 F.R.D. at 158.

The defendants' request the Court follows the decisions in *de la Cruz-Paulino* and *Anderson*, requiring the government to designate evidence it intends to use in its case-in-chief. *See de la Cruz-Paulino*, 61 F.3d at 994-5; *Anderson*, 416 F. Supp. 2d at 112. The government argues for a modified application of Rule 12(b)(4)(B) citing to orders issued by United States District Court for the District of New Mexico Judges Brack and Herrera. Judge Brack and Judge Herrera chose to take a moderate strategy in its application of Rule 12(b)(4)(B) requiring the government to provide notice of evidence it did not plan to introduce in its case-in-chief. *See United States v. Lujan*, 530 F. Supp. 2d

1224, 1246 (D.N.M. 2008); *United States v. McCluskey*, Cr. No. 10-2734 JCH, Memorandum Opinion and Order, Doc. 446 at 29-30 (D.N.M. May 11, 2012) (unpublished slip op.); *United States v. Moya*, Cr. No. 15-1889 JCH, Memorandum Opinion and Order, Doc. 117 at 3 (D.N.M. Sept. 29, 2016).

This case requires a more direct application of Rule 12(b)(4)(B), that is notice of evidence that the government plans to introduce in its case-in-chief, because of two reasons. First, the copious discovery that has already been disclosed under Rule 16 will not allow the defendants to effectively challenge or move for its suppression. The Coordinating Discovery attorney, Russ Aoki estimates that as of September 28, 2017, the government has disclosed approximately 2,824 (1,111 are Bates stamped) .pdf files, 4,939 audio files (not Bates numbered) and 38,963 .jpeg files.

Should the government only be required to designate evidence it does not intend to use, the defendants will still be in a position of having to guess as to what evidence may require a motion to suppress. A moderate application of Rule 12(b)(4)(B) will not save the parties time and resources from needlessly litigating unnecessary motions to suppress evidence the government does not intend to use in its case-in-chief. *See United States v. Lujan*, 530 F. Supp. 2d 1224, 1246 (D.N.M. 2008).

Second, the government has yet to satisfy its disclosure obligations under Rule 16. *See* Docs. 1270, 1267, 1253, 1061, 1037, 678, 668, 539, 483 (requesting extensive disclosure of evidence by the government pursuant to Rule 16). With more evidence

pending to be disclosed and the defendants' obligations under Rule 12(b)(3), the government must be required to satisfy its duty under Rule 12(b)(4)(B) to notice the defense of evidence it knows intends to use at trial. Fed R. Crim. P. 12(b)(4)(B); *see Cruz-Paulino*, 61 F. 3d at 994. In absence of a direct application of Rule 12(b)(4)(B), the integrity of an already anticipated complex trial may be comprised because defendants will be forced to interrupt proceedings by filling motions suppress when government introduces evidence requiring challenge. *See Cruz-Paulino*, 61 F. 3d at 993; *see also United States v. Yonis Muhudin Ishak*, 277 F.R.D. 156, 159-60 (E.D. Va. 2011).

The government asks the Court for a "measured course" in its application of Rule 12(b)(4)(B) because the evidence it intends to use at trial simply cannot be determined with "absolute specificity" this far ahead of trial. *See* Doc. 1334. Considering the length of time this case has been in litigation, the government likely has some knowledge of evidence it disclosed under Rule 16 that it intends to use in its case-in-chief. Furthermore, the first group of defendants will be proceeding to trial in a little more than 2 months.

Additionally, and as a means for correction for Document 1281, defendants ask, at minimum, that the government notice with a good faith estimate items of evidence that intends to use at trial, and if identified with specificity, it would not disclose the government's trial strategy. *See United States v. Jacobs*, 650 F. Supp. 2d 160, 172 (D. Conn. 2009).

For these reasons, the Mr. Garcia and joined defendants respectfully request the Court grant the Defendants' Motion for Notice by the Government Pursuant to Rule 12(b)(4)(B).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was served on counsel for the government via the Court's CM/ECF system on this 30th day of October, 2017.

/s

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